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APR

No. 814

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, PETITIONER

v.

MERCHANTS MATRIX CUT SYNDICATE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on September 3, 1958.

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (GA. 74–84)[1] are unreported. The opinion of the court of appeals (*infra*, pp. 21–33) is reported at 259 F. 2d 747.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1958 (*infra*, p. 33). A timely peti-

[1] "GA." refers to the Government's appendix in the court of appeals; "MA.", to respondent's appendix. "Tr." refers to the original transcript of the trial proceedings.

tion for rehearing was denied on November 4, 1958 (*infra*, pp. 34, 35). By order of Mr. Justice Clark, entered on January 28, 1959, the time for filing a petition for a writ of certiorari was extended to and including April 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in an action for damages under the Federal Tort Claims Act by a former tenant of a building alleged to have been wrongfully evicted by the Government, the amount paid by the Government for the use of the building under a lease with the owner entered into under threat of condemnation may be used as the measure of the value of the space occupied by the tenant.

2. Whether, if so, the cost of the Government's alterations to the building after it took possession and its costs of operating the building as altered may be added to the rent to determine the amount "paid" by the Government to measure the value of space in the building before the alterations.[2]

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[2] The following additional questions, although not urged as a basis for granting the writ, are also preserved:

3. Whether respondent was entitled to damages for the loss of its leasehold for the period during which it remained in possession.

4. Whether respondent's claim to damages for loss of profits prior to December 8, 1951, was barred by the statute of limitations.

5. Whether the award of damages to respondent for loss of profits was supported by evidence.

STATEMENT

1. In 1951, the General Services Administration, seeking suitable space for use by the Bureau of Public Debt, determined to acquire the use of the Rand-McNally Building in Chicago. The building, owned by Clark-Congress Corporation, was a 10-story loft building having about 500,000 square feet of usable space (Tr. 178, 210). At the time, some 80,000 square feet of space was vacant but the balance was occupied by approximately 80 tenants under leases which ran for varying terms (Tr. 120–121, 124). On June 22, 1951, the Government entered into a lease with Clark-Congress which recited that it was made "in lieu of condemnation proceedings or an award therein, the Government having indicated that it was considering instituting condemnation proceedings to acquire the rights herein granted" (GA. 16, 31). For the term August 1, 1951, to December 31, 1951, the Government leased the then-vacant space in the building plus the additional space becoming available during that period. For the term January 1, 1952, to December 31, 1956 (renewable for an additional 5-year term), the Government leased the entire building subject to any existing tenancies.

Under the terms of the lease, Clark-Congress was required to cooperate with the Government in terminating the existing leases (GA. 29). Most of the leases provided for termination without liability in the event of condemnation or were otherwise terminable, and by the end of December substantially all of the tenants had vacated the premises as requested by Clark-Congress and the Government (Tr. 121–126,

220). As the premises were vacated, the Government undertook a major remodeling of the building at a total cost of some $2,500,000 (Tr. 206), in effect converting the predominantly loft building into a modern office building. The alterations, which were authorized but not required by the Government's lease (GA. 21–22), were begun in October 1951 and completed by March 1953 (Tr. 168).

2. Respondent occupied some 8600 square feet of space on the eighth floor of the building and was there engaged in the manufacture of newspaper matrices, stereotypes, and thermal and plastic plates for advertising copy (GA. 75, 82). Its lease, which ran until August 31, 1953, contained no condemnation clause or other termination provision. To obtain possession of respondent's space (and the space occupied by two other tenants remaining in the building), the Government, on December 12, 1951, filed a complaint and a declaration of taking in a condemnation action, seeking to take respondent's leasehold from and after January 1, 1952. The district court postponed the taking of possession until May 1, 1952, and respondent finally moved from the building on April 23, 1952. An award of compensation to respondent, entered after a jury trial, was reversed on appeal because of trial errors. *United States* v. *Merchants Matrix Cut Syndicate*, 219 F. 2d 90 (C.A. 7), certiorari denied, 349 U.S. 945. That case on remand is still pending in the district court.

While the condemnation action was pending, respondent, on December 8, 1953, filed the present suit against the Government under the Federal Tort

Claims Act (28 U.S.C. 1346(b)) (GA. 2–8). The district court found that the Government's alteration work was carried on in a "negligent and wrongful" manner; unreasonably interfered with respondent's rights of peaceful possession (*e.g.*, by noise, dust, interruption of electrical and steam service, blocking of corridors and the loading dock, monopolization of the elevator service, etc.); made the premises unfit for the purposes for which respondent had leased them; and constituted a constructive eviction of respondent taking place on December 9, 1951 (*i.e.*, 3 days before the declaration of taking was filed on December 12) (GA. 74–84). The court gave respondent judgment for damages in the total amount of $104,128.18, which included the following item (GA. 82):

Fair market value of [respondent] Merchants' use and occupancy of space in the Rand McNally Building as measured by what next immediate occupier, United States of America, paid for that space under a voluntary lease, namely $3.66 per square foot, less rent reserved in Merchants' lease of $1.54 per square foot; differential $2.12 per square foot, 8600 square feet for 1 year and 9 months from date of eviction to end of term	$31,906.00

The damages also included $36,747.78 for "loss of profits" from October 1, 1951, to April 30, 1952, as measured by the difference between respondent's profits for that period and its profits for the same period of the preceding year (GA. 81–82; Tr. 235, 243–245). The rest of the damages consisted of various items of direct moving costs and losses on machinery not adaptable to respondent's new premises (GA. 82; Tr. 251–268).

The court of appeals held that "moving expenses" could not be recovered but affirmed the judgment in all other respects (*infra*, pp. 32–33). It remanded the case to the district court with directions to eliminate "any and all elements of moving expenses and then enter judgment, as thus reduced, for" respondent (*infra*, p. 33).

3. The questions urged by this petition relate only to the damages allowed for respondent's loss of its leasehold, which in turn are based on the "fair market value" of use of space in the building as of December 9, 1951, the date of "eviction." The evidence relevant to that issue was as follows:

Clark-Congress purchased the building on July 1, 1949, for a total price of $1,500,000, or $3/sq. ft. for the 500,000 square feet of usable space (Tr. 209). Respondent's main lease, entered into on May 19, 1949, provided for a rental of $1.54/sq. ft. (GA. 9, 74, 82). On April 19, 1951, respondent leased an additional room at $1.64/sq. ft.[3] A floor plan of the eighth floor, introduced into evidence by respondent as part of its proof of the space occupied by it (Tr. 184–187), shows rent per square foot paid by other tenants on that floor to have been as follows (Pltf. Exh. 28; MA. 15):

Rooms:	Rent per square foot
801–03	$1.42
805–09	1.43
808	1.49
811–13	1.41
821–25	1.55
824–28	1.53
830	1.56
843–45	1.42
855–61	1.56
862–90	0.92

[3] Room 844, which contained 402 square feet (MA. 15), and was leased for $660 per year (GA. 13).

Under its lease with Clark-Congress, entered into on June 22, 1951, the Government agreed to pay rent at an annual rate of $1.33½/sq. ft. for the term August 1–December 31, 1951 (GA. 16–17). During that term, Clark-Congress was required to furnish heat, water, electricity, and elevator service (GA. 20). For the five-year term commencing January 1, 1952, the rent was at an annual rate of $1/sq. ft. ($2,500,000 for the entire building for the five years) (GA. 18). During that term, Clark-Congress was required to pay all real estate taxes and assessments but was not required to furnish services (GA. 20–21).

The only witness on the issue of valuation was respondent's expert witness, Gilbert H. Scribner (Tr. 200–214). He testified that office rentals in two nearby buildings were between $2.50 and $2.75/sq. ft. and, in a third building, between $3.25 and $3.50/sq. ft. (Tr. 207–209). On cross-examination, he admitted that those buildings were office buildings and were not comparable to the Rand-McNally Building which, prior to its conversion by the Government, was a loft building (Tr. 212–213).

The balance of Scribner's testimony was of what its five-year lease "would cost the Government" (Tr.

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[1] See, *e.g.*, the floor plan of the eighth floor (Pltf. Exh. 28; MA. 15), showing one room 212 feet in length and two rooms each about 94 feet in length. The building had a floor load capacity designed to accomodate heavy machinery (Tr. 202; GA. 76). A large part of the building was used by Rand-McNally & Company for its printing business and a great many of the other tenants were in similar businesses (Tr. 202). See also the district court's description of respondent's premises and business (GA. 75–76). The building, in short, was an industrial loft building with only incidental office space.

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206). He testified that the Government's rent was $1/sq. ft. (Tr. 205); that the Government's alteration costs were $2,500,000, which, if amortized over a five-year period, would be $1/sq. ft. per year;[*] and that the Government's cost of maintenance and services "might be as high as $1.66 a foot" (Tr. 206). The $1.66 operating cost figure, he explained, was based on a published experience table showing the average of such costs for 40 "downtown" buildings (presumably office buildings) (Tr. 207). On the basis of this testimony, the district court found, as noted above, that the "fair market value" of the space occupied by respondent, as "measured by" what the Government later "paid" for it, was $3.66/sq. ft.—*i.e.*, the sum of the three items testified to by Scribner.

REASONS FOR GRANTING THE WRIT

While there are, we believe, numerous other errors in the decision below (see Point II, *infra*), we urge as a reason for granting the writ (Point I) only the single question which we consider to be of broad general importance—whether amounts paid for property by a condemnor (or potential condemnor) may be used as evidence of the value of that property—together with a subsidiary question intimately related to that issue.

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[*] Tr. 206. The witness actually testified that the amortized alteration costs "with interest on the declining balances" would be $1.15/sq. ft. The district court, however, obviously ignored the interest element and amortized the costs on a straight-line basis—*i.e.*, $2,500,000 for 500,000 square feet for five years, or $1/sq. ft. per year.

I

1. The value of the use of the space from which respondent was evicted was determined by the district court expressly, and solely, on the basis of what the Government "paid" for the space under its lease with Clark-Congress. That lease recited, in turn, that it was entered into in lieu of condemnation of the interest thereby granted and that it could be used as a stipulation controlling the award to be made should the Government proceed with the originally contemplated condemnation (GA. 31). The case thus squarely raises the question whether transactions with a condemnor, under threat of condemnation, may be used as evidence of the value of property, or whether, on the other hand, the element of coercion present and the policy of encouraging voluntary settlements precludes the use of such evidence. Because the district court based its judgment exclusively on that evidence, the question, usually posed only as one of the admissibility of such evidence, is presented here in peculiarly sharp form.

a. The question is of general importance. While the particular circumstances of this case may be relatively uncommon—where the transaction sought to be used as evidence is a lease rather than a purchase of property and the property leased includes in part the very interest sought to be valued—the question is the same as that posed almost every day in condemnation proceedings by attempts to show, as evidence of the value of the property taken, what the Government paid for comparable property in the vicinity. More-

over, the Government not infrequently condemns property it has previously leased (as it has the Rand-McNally Building) and the question in such cases whether the lease rentals may be used (by capitalization) as evidence of the value of the fee is not even factually distinguishable from the question in this case.

While the proceedings in which such evidence is sought to be used are often themselves condemnation proceedings, the controlling question is the nature of the transaction sought to be used as evidence; and the character of the proceedings in which the evidence is offered is immaterial. The same question may be raised in any kind of proceeding in which a question of valuation is in issue (*e.g.*, a tax case or, as here, a tort action), and the question thus has a significance beyond that of the evidence admissible in condemnation actions.

b. In allowing a transaction with the Government under threat of condemnation to be used (here conclusively) as evidence of value, the decision below is in direct conflict with the great weight of authority in the federal courts holding that, in valuing one parcel of land in a condemnation proceeding, evidence of the prices paid by the Government for other parcels in the vicinity is not admissible. *United States* v. *Reynolds*, 115 F. 2d 294 (C.A. 5); *United States* v. *13,255.53 Acres of Land*, 158 F. 2d 874 (C.A. 3); *United States* v. *Foster*, 131 F. 2d 3 (C.A. 8), certiorari denied, 318 U.S. 767; *Murdock* v. *United States*, 160 F. 2d 358 (C.A. 8); *United States* v. *Bailey*, 115 F. 2d 433 (C.A. 5); see also *Justice* v. *United States*,

145 F. 2d 110, 111 (C.A. 9). "This rule, based upon the view that such payments are in the nature of compromise to avoid the expense and uncertainty of litigation and are not fair indications of market value, is the generally prevailing rule in this circuit and elsewhere." *Slattery Co.* v. *United States*, 231 F. 2d 37, 41 (C.A. 5). The rule is the same whether the evidence relates to a purchase in lieu of condemnation (*Reynolds, Foster,* and *Bailey, supra*), to a voluntary settlement after condemnation proceedings have been instituted (*13,255.53 Acres of Land* and *Murdock, supra*), or to an award made in a condemnation proceeding (*Justice* and *Foster, supra*). The exclusion of such evidence is also "almost, if not quite, universal" in the state courts. 5 Nichols, *Eminent Domain*, § 21.33, p. 295 (3d ed. 1952); see also Orgel, *Valuation under Eminent Domain*, 147 (2d ed. 1953).

The Court of Appeals for the District of Columbia Circuit has apparently modified the absolute rule of exclusion stated above by allowing such evidence to be admitted upon affirmative proof that the sale was made "without compulsion, coercion or compromise" (*Hannan* v. *United States*, 131 F. 2d 441, 442)—a view expressly recognized by Judge Stephens, concurring on that issue, to be the "minority rule" (*id.* at p. 444).*

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*More recently, however, that court, undertaking to "determine more specifically the type of compulsion, coercion, or compromise which must be rebutted," stated: "A comparable sale was not under compulsion, coercion, or compromise in this sense if * * * [it is] shown, that the public records do not disclose that the sale was at foreclosure, * * * under pressure of the exercise of the power of eminent domain, or other coercion *sui generis*." *District of Columbia Redevelopment Land Agency* v.

The Second Circuit, while expressly recognizing the division of authority on the question, has likewise indicated a willingness to admit evidence of such sales by refusing to disqualify expert witnesses because they had considered such sales. *United States* v. *Delano Park Homes,* 146 F. 2d 473; *United States* v. *Meadow Brook Club,* 259 F. 2d 41, certiorari denied on other issues, 358 U.S. 921. While we believe the evidence here would have been excluded even under the view adopted in the District of Columbia—since it appears on the face of the lease that it was a compromise of a contemplated condemnation proceeding—these cases nevertheless emphasize the conflicting views on the subject among the circuits and the need for resolution of the question by this Court.

c. Reason as well as authority supports the rule of exclusion. The first basis for exclusion is that sales to a potential condemnor lack the essential elements of a transaction presumed to reflect "fair market value": a buyer willing but not compelled to buy and a seller willing but not compelled to sell. While the compulsion on the seller is the more obvious, that on the condemnor is no less real. The very reason agencies are given the eminent-domain power is that their needs for particular property are often peculiarly imperative. The condemnor is no more free not to acquire a lot in the path of a proposed highway than the owner is free not to sell it. Each side must either

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61 Parcels of Land, 235 F. 2d 864, 865. Whether this means that it is enough to require exclusion that the sale was "under pressure of the exercise of the power of eminent domain," in effect a return to the majority rule of exclusion, is not clear.

agree to a sale or litigate the value of the property in a condemnation proceeding. Thus the "sale" is essentially a compromise of the impending condemnation action, and, as is true of all compromises, either side may give more or take less than his due in order to avoid the expense and uncertainty of litigation. See, *e.g.*, Orgel, *Valuation under Eminent Domain*, § 147, p. 618 (2d ed. 1953).

The second reason for exclusion is closely related: the policy favoring amicable settlements of litigation. That policy has particular force in condemnation because of the great volume of land acquisitions under eminent domain power and thus the potentially great volume of condemnation proceedings. There are now pending, for example, 2,567 cases to condemn 25,743 tracts of land for federal purposes alone. Without diligent efforts by government agents to effect such acquisitions by negotiated settlements wherever possible, the courts would soon be overburdened with condemnation cases. To encourage such settlements—often at a price that may be thought to be greater than the fair market value but justified in order to avoid the expense of litigation—it is essential that they not be used against the Government as evidence of value in other proceedings. If settlements are to be given that collateral consequence (*i.e.*, made the basis for awards in other proceedings), protection of the interests of the Government may often require a particular case to be litigated, in order to avoid that consequence, even when a settlement at the offered price would be more economical in the individual case. That also suggests why a resolution by this Court of the existing

conflict over the admissibility of such evidence is important—*i.e.*, so that government agents negotiating purchases of land in lieu of condemnation (or in settlement of pending condemnation cases) may know with certainty the consequences to be attached to such settlements.

2. The second question presented, closely related to the first, turns upon the inclusion in what the Government "paid" for use of the property, as a measure of its value, of the Government's alteration costs and the Government's purported cost of operating the building as altered.

Viewed as a matter of principle, the inclusion of such items in the measure of value was erroneous because it sought to measure the value of the property by its peculiar value to the Government, in direct conflict with the established law that it is only "market" value, not unique value to the Government, that is relevant. *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377; *United States* v. *Foster*, 131 F. 2d 3, 6 (C.A. 8), certiorari denied, 318 U.S. 767. In addition, the attempt to enhance value because of the Government's expenditures for the very project for which the property was taken is contrary to *United States* v. *Cors*, 337 U.S. 325, and *United States* v. *Miller*, 317 U.S. 369.

Viewed in terms of the facts of this case, the inclusion of those items in the measure of the "market value" of the use of the space from which respondent was ousted was simply a *non sequitur*. Respondent had the use of space in an industrial loft building, and it is not perceived how the cost of converting

such a building into an office building, or of maintaining it after its conversion,[7] can bear upon its value before the conversion. Even if value to the Government, as opposed to market value, were relevant, the most that was shown was the value to the Government of something very different (use of the building with improvements costing $2,500,000) from the interest lost by respondent (use of the building without the improvements).

Because the inclusion of the Government's alteration and operating costs in the measure of respondent's damages was so obviously erroneous, we doubt that the error would be likely to be repeated in other circuits and thus hesitate to urge that the question is of "general importance." Nevertheless, the existence of the decision can only cause difficulty in future cases[8]—especially within the Seventh Circuit, the

[7] Though not clear from the record, we think it obvious that the $1.66 operating cost figure was based on the experience of office buildings (40 "downtown" buildings), not loft buildings, especially since the testimony was in terms directed to what it was going to cost the Government to operate its (*i.e.*, remodeled) building rather than to what it had cost Clark-Congress to operate the loft building prior to its conversion. In any event, as evidence of the latter, the figure is patently unsound—unless Clark-Congress was not recovering even out-of-pocket operating costs from a single tenant on the eighth floor (see the Statement, *supra*, p. 6). Indeed, the figure is equally unsound as evidence of what it would cost the Government to operate the building as an office building: the cost of operating an entire building for governmental use would obviously bear no relation to the typical costs of operating commercial office buildings occupied by many different tenants (upon which the figure was based).

[8] Indeed, in proceedings now pending to condemn fee title to the Rand-McNally property, the building owner is relying

courts of which cannot ignore it—and, for that reason, we believe a review of the decision by this Court to be warranted.

II

In addition to the matters urged above as reasons for granting the writ, the decision below is, we submit, replete with errors both of law and of fact, among which are:

(*a*). Respondent was given damages for the value of its leasehold for the entire period from December 1, 1951, to August 31, 1953 (1 year and 9 months, see GA. 82), notwithstanding that it remained in possession until April 23, 1952, and was otherwise compensated (by the damages for loss of profits) for any interference with its peaceful occupancy during that period.

(*b*). Damages for loss of profits were allowed for the entire period from October 1, 1951, to April 30, 1952, notwithstanding that the two-year statute of limitations of the Tort Claims Act (28 U.S.C. 2401(b)) barred claims accruing prior to December 8, 1951.

(*c*). The damages allowed for "loss of profits" were measured by the difference between respondent's profits for that period and its profits for the same period of the preceding year, as testified to by the bookkeeper (Tr. 232–241). The only evidence relating that item to the Government's construction disturbances was the testimony by respondent's presi-

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upon the decision below to support its claim to compensation for the value of the building as enhanced by the Government's improvements.

dent (Tr. 243–245) that the decline of profits was caused by "a good many factors" but "most of it was because of the additional cost of doing business" under the conditions created by the construction work, although he conceded that respondent also "did less business"[9] in the latter period (Tr. 243, 244).[10]

(*d*). The holding that respondent could be "constructively evicted" while continuing in possession and without giving notice of an election to terminate its lease is, to our knowledge, unprecedented.

(*e*). The finding that respondent's decision to seek quarters elsewhere was prompted by the temporary inconvenience caused by the alterations rather than by the impending taking of its leasehold is untenable, if only because the quarters contracted for were not to be available until after the disturbances complained of (the demolition in October–December 1951) had ceased.

(*f*). The district court's conclusion of law that the eviction occurred on December 9, 1951 (internally

[9] While showing a net profit for the period from October 1951 through April 1952, respondent had a net loss for the entire calendar year 1952 (Tr. 239–240)—that is, profits continued to decline after respondent moved to its new building.

[10] Not only was no attempt made to identify or show the amount of any such items of "additional cost" attributable to the alterations, but no attempt was made to eliminate the loss of profits necessarily resulting from the interruption of business during the moving operations. Losses so caused would of course not be allowable for the same reason that the direct moving expenses are not—respondent would have had to move anyway at the end of its lease term (August 31, 1953) and the losses incident thereto were made no greater by the earlier termination of the lease. Presumably, however, the court of appeals' remand for the purpose of eliminating "moving expenses" leaves that item open.

inconsistent with its later conclusion that it occurred on November 15, see Concl. 4, 9, GA. 84), is contrary to its own findings of fact that respondent decided that it was forced to "abandon" the premises on November 15 and found a new building on November 20 (GA. 80–81).[11]

Although the error of the ruling on each of the above issues is in our view patent, we urge none of them as a reason for granting the writ. Many of the questions are of fact; others, though of "law," turn so heavily on the particular facts of this case as to be of little general importance; and the rulings on the rest can perhaps best be treated as unlikely to influence the course of the law.[12] Nevertheless, while not

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[11] Although not mentioned in the findings of fact, the December 9th date—conveniently after the cut-off date for the statute of limitations (December 8) and before the declaration of taking (December 12)—is apparently based on respondent's president's testimony that the formal agreement for the purchase of the new building was not signed until December 9 (Tr. 146). He further testified, however, that he made up his mind to move in the middle of November and verbally agreed upon the purchase of the building, and drafted the agreement, in late November (Tr. 144, 146).

[12] So also we do not urge here the questions much mooted below whether this action was barred by *res judicata* (by virtue of the proceedings on respondent's cross-claim against Clark-Congress in the condemnation action, *United States* v. *Merchants Matrix Cut Syndicate*, *supra*; see also *Intertype Corp.* v. *Clark-Congress Corp.*, 240 F. 2d 375); whether there was an exercise of eminent domain power prior to the initiation of the condemnation action; whether the alteration work, necessary for government purposes, was "wrongful" or "negligent"; or whether the action of the court of appeals in this case was consistent with its holdings in the prior proceedings arising out of this acquisition. These questions, too, turn primarily on the particular facts and the tortured course taken by the previous

urging any of the above questions as a basis for the writ, we have preserved several of them as "Questions Presented" (see note 2, *supra*) should the Court, if it grants the writ, wish to provide more complete relief rather than limit the writ to the questions specifically urged. In doing so, we have preserved only those questions which will have a substantial effect upon the final outcome of the controversy between the parties and which we believe will not unduly complicate the case or tend to obscure the more important questions urged in Point I—namely, whether respondent was entitled to damages for the loss of its leasehold for the period during which it remained in possession; whether respondent was entitled to damages for loss of profits prior to December 8, 1951; and whether the award of damages for loss of profits was supported by evidence (*i.e.*, the questions discussed as (*a*), (*b*), and (*c*), *supra*).[13]

litigation over the building's acquisition, a full explanation of which would probably obscure the prime issue presented here. For the history of this litigation, see, in addition to the above-cited cases: *United States* v. *Advertising Checking Bureau, Inc.*, 204 F. 2d 770 (C.A. 7); *Intertype Corp.* v. *Clark-Congress Corp.*, 249 F. 2d 626 (C.A. 7); *Meyer* v. *United States*, 159 F. Supp. 333 (C. Cls.). There is more litigation to come, arising out of the Government's later condemnation of the fee.

[13] We have not preserved the questions going to whether there was an "eviction" occurring within the period of limitations (questions (*d*), (*e*), and (*f*), *supra*, pp. 17–18) because, should our view that there was no eviction prevail, respondent would then be entitled to compensation for its leasehold in the pending condemnation action. The importance of having the value of the leasehold determined by a jury (in the condemnation action) rather than by the court (in the tort action) does not seem sufficient to justify prolonging further this drawn-out litigation. The questions noted in note 12, *supra*, are not preserved

CONCLUSION

For the foregoing reasons, it is submitted that this petition for a writ of certiorari should be granted.

Respectfully,

J. LEE RANKIN,
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APRIL 1959.

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because they introduce complicated collateral issues which, while not themselves of general importance, would, we believe, tend to obscure the argument on the main question sought to be presented.

APPENDIX

In the United States Court of Appeals for the Seventh Circuit

September Term, 1957, April Session, 1958

No. 12197

MERCHANTS MATRIX CUT SYNDICATE, INC., PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

September 3, 1958

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Before FINNEGAN, SCHNACKENBERG, and PARKINSON, Circuit Judges

FINNEGAN, *Circuit Judge:* Merchants Matrix Cut Syndicate, Inc., brought suit in the United States District Court for the Northern District of Illinois seeking recovery under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) for damages alleged to have been caused by the wrongful, wilful, and negligent acts of the officers and employees of the General Services Administration "and the officers, employees and agents of Clark-Congress Corporation." But of the latter, Merchants expressly alleged: "Clark-Congress Corporation has not been made a party defendant herein, as it has been previously sued by this plain-

tiff by reason of the matters and things herein set forth, has been held to be a joint tort feasor with respect thereto, and a judgment has heretofore been entered in favor of this plaintiff (Merchants) against said Clark-Congress Corporation by reason thereof in this (District) Court." This allegation refers to Merchants' cross-claim against its landlord, Clark-Congress Corporation, on which judgment was entered June 26, 1953, subsequently reversed by our Court on January 17, 1955 (filed during condemnation proceedings), as *United States* v. *Merchants Matrix Cut Syndicate,* 219 F. 2d 90 (7th Cir. 1955). In the case now before us the government, defendant, has appealed a judgment order, entered below July 23, 1957, awarding Merchants damages of $104,123.18 for alleged torts relating to actions taken in connection with the government's use and occupation of the Rand-McNally Building, Chicago, Illinois.

Our opinion, just cited, and *Intertype Corporation* v. *Clark-Congress Corporation,* 240 F. 2d 375 (7th Cir. 1957); *United States* v. *Advertising Checking Bureau,* 204 F. 2d 770 (7th Cir. 1953); *Meyer* v. *United States,* 159 F. Supp. 333 (Crt. Cl. 1958) and *Meyer* v. *United States,* 150 F. Supp. 314 (Crt. Cl. 1957) are varying and related aspects of the basic controversy.

United States v. *Merchants Matrix Cut Syndicate,* 219 F. 2d 90 (7th Cir. 1955), was a condemnation proceeding by the government in which, among others, Merchants Matrix Cut Syndicate, Inc., as tenant was joined as defendant along with its landlord, Clark-Congress Corporation. Merchants then cross-claimed, in that condemnation suit, against its co-defendant Clark-Congress seeking damages. Merchants received $44,027.91, on its cross-claim, from Clark-Congress and the latter appealed. Despite some opposite views persistently adhered to by these litigants, we, in our

previous opinion (219 F. 2d 90, 99) said: "* * * judgment entered on the * * * cross-claim[s] of Merchants Matrix Cut Syndicate, Inc., * * * is hereby reversed and remanded to the District Court with directions to *sustain* the * * * motion(s) of Clark-Congress Corporation to strike * * * (the) cross claim." We struck down this cross claim, among the others, on the merits. (See page 96 of 219 F. 2d.) Just why both sides still insist that cross-claim has vitality has not been given any legalistic reason, even if it were relevant. Our opinion was handed down on January 17, 1955, and the tort action, now before us, went on trial in the district court commmencing April 19, 1957.

In any event the condemnor-plaintiff government was neither a party nor privity to the cross-claim just described. We said, based on the authorities cited in our earlier opinion, that expenses of removal and consequential damages could not be included in just compensation computed as and for a condemnation award.

Earlier the issue of conspiracy between Clark-Congress and the government to oust Merchants was actually litigated and when the question came before us on review we held (219 F. 2d 90) that there was absent any such showing. We also said, and still adhere to the view, that moving, packing and other expenses discussed in *U.S.* v. *Merchants Matrix Cut Syndicate*, 219 F. 2d 90, 97-99 (7th Cir. 1955) simply could not be recovered in eminent domain proceedings. Now the government seeks to invoke that judgment (219 F. 2d 99) and the opinion written by the late Judge Lindley, reported as *Intertype Corporation* v. *Clark-Congress Corporation*, 240 F. 2d 375 (7th Cir. 1937), to overturn the judgment appealed. It could be said Merchants is attempting to impose liability on a new adversary, the government, despite the two earlier

judgments or in the face of some precedent—*res adjudicata* and *stare decisis* both having been interposed by the government in the district court. Failure to establish the conspiracy would not necessarily rule out the possible existence of other actual tortious acts by government agents for which redress might be obtained under the Tort Claims Act. What Merchants is urging in substance is that the government acquired interests in its sovereign capacity and then as a cotenant pursued a tortious course of conduct, the conspiracy element aside, causing damage to Merchants. This later point was not litigated before this because no such claim was asserted against the United States as a tort-feasor. Concededly all items in the reversed judgment against Clark-Congress are also included in the current judgment against the government.

Under Rule 52, Federal Rules of Civil Procedure the following relevant findings of fact can be left undisturbed except as stated below.

> 1. Merchants Matrix Cut Syndicate, Inc., first became a tenant in the Rand McNally Building, 536–538 South Clark Street, Chicago, Illinois, in the year 1915, and remained a tenant in said building continuously thereafter under various leases, so that Merchants Matrix Cut Syndicate, Inc., was on June 22, 1951, in lawful and peaceable possession and use and occupancy of approximately 8600 square feet of space, consisting of various rooms connected by corridors, on the 8th floor of said Rand McNally Building under and by virtue of two certain leases, one from Rand McNally & Company dated May 19, 1949, for a period beginning on June 16, 1949, and ending August 31, 1953, and the other, as to Room 844 only, from Clark-Congress Corporation, dated April 27, 1951, for a period commencing May 1, 1951, and ending August 31, 1953. Clark-Congress Corporation purchased

the building from Rand McNally & Company on June 30, 1949, and was the landlord of Merchants Matrix Cut Syndicate, Inc., and Clark-Congress Corporation also was the landlord of the United States of America (G.S.A.) after entering into a lease with the United States of America on June 22, 1951, which lease is Plaintiff's Exhibit No. 18, and which leasing was a voluntary leasing by both parties thereto.

2. Merchants Matrix Cut Syndicate, Inc., was using and occupying said premises by engaging therein in the business of manufacturing newspaper matrices, stereotypes and thermal and plastic plates, all to be used for advertising purposes. It had in and on said premises certain heavy machines ranging in weight from 1 to 8 tons, and a number of said machines, which were continuously used in Merchants' production, were connected to live steam, electricity, gas and water, and it was necessary to the use of these machines that these services be furnished to said machines. Merchants Matrix Cut Syndicate, Inc., was operating its manufacturing plant in the Rand McNally Building on a three shift, 24 hour a day basis, and was engaged in a delicate manufacturing process in that the plates used for fine newspaper ad reproduction had up to 120 lines per square inch in them, and a pressure of approximately 600 tons per square inch was put on said plates when pressing mats from them. The customers of Merchants Matrix Cut Syndicate, Inc., were newspapers in Chicago, such as the Chicago Tribune, Chicago Daily News, Chicago American and Chicago Sun-Times, and various other large newspapers located throughout the United States, various large monthly and weekly national magazines, and various advertising agencies. Speed in meeting advertising publication deadlines in the delivery of its products was an essential to the successful operation of the business of Merchants Matrix Cut Syndicate, Inc.

3. The services necessary to Merchants Matrix Cut Syndicate, Inc.'s business operations, such as 24 hour elevator service and live steam, had been continuously through Merchants' 35 year occupancy in the building, furnished to Merchants, and had been and were furnished to Merchants up to and including October 3, 1951, without interruption, and the Rand McNally Building additionally furnished direct electric current to Merchants' machinery, motors and electrical motor controls, and in addition the Rand McNally Building had the requisite 250 pounds per square foot floor load capacity to accommodate Merchants' heavy machinery. In addition the Rand McNally Building had an interior courtway area and "truck-high" loading docks, and also had the requisite elevator capacity to carry the heavy cases of mat material shipped twice monthly to Merchants up to its quarters on the 8th floor of the Rand McNally Building. There was no other available rental space in the City of Chicago which had the necessary facilities for Merchants' business operations in the months of October and November, 1951.

4. The Government knew at the time of the acts herein complained of, that Merchants was a tenant in the Rand McNally Building, in possession and occupancy of space, and conducting its manufacturing operations, on the 8th floor of the building under valid leases, and knew it had leased space in the building subject to existing leases; and the Government knew or should have known the nature of Merchants' business operations; and the Government had a duty as a tenant in the building, in making alterations and remodeling the space under lease to it, to have due regard to Merchants' property rights as an occupant of space in the building, and a duty to so carry on such remodeling and alteration work, as not to interfere with, interrupt and disturb Merchants'

in carrying on and conducting its business, in the exercise of its rights of possession, beneficial use, enjoyment and occupancy of its space in the building.

5. Starting on or about the 3rd day of October, 1951, the United States of America through the General Services Administration, an agency of the United States of America, its employees, agents and servants, including contractors, sub-contractors and laborers, was engaged in demolition work in alteration and reconstruction of the Rand McNally Building, and in that work knocked down the interior walls of that building on the 8th, 9th and 10th floors of said building in a negligent and unlawful manner, knocking down and laying over on the floor as much as 100 feet of wall at one time, and also drilled through concrete floors and ceilings approximately one foot thick with jackhammers run from air compressors in order to run electrical wiring through the building, and otherwise engaged in negligent activities, such as pulling the wrong fuses in electrical fuse boxes, etc.; all of which created excessive and all pervasive fine plaster dust that freely invaded Merchants' space in the building, and settled on and damaged Merchants' matrices and plastic and copper plates, and upon Merchants' machines and equipment. The continuance of the demolition of walls and alteration work clogged and blocked the corridors outside of Merchants' space so that it was delayed in trucking—on two and four wheel hand trucks—material from one part of its plant to another and from its plant to the elevators, interrupted and cut off the electrical current and live steam normally supplied to Merchants' machinery so that production was delayed as long as three or four hours at a time, and generally created interference and disturbance as well throughout the elevators, corridors, and courtway and other public areas of the building and

hampered Merchants' normal use of these areas. The express companies which had previously been making daily pick-ups and deliveries to Merchants were unable to get into the courtway of the building due to the taking over of the courtway by use made by the defendant of the courtway in mixing cement and dropping of debris in the courtway and the clogging thereof by the trucks of defendant in hauling materials and debris in and out of the courtway. The United States of America persisted in these acts and created these interferences and disturbances even though complaints were made by Merchants' employees to Mr. Sloan, Construction Engineer in charge of alteration and reconstruction work in the building for the United States of America (G.S.A.). The United States of America knocked down walls in certain spaces in the building before the existing leases on such space had been cancelled by Clark-Congress Corporation and before such space had been turned over to the Government by Clark-Congress Corporation.

6. The acts of the United States of America in the building during this period were far above and beyond the usual and ordinary remodeling by one tenant in a building that customarily goes on in a building of this type, occupied by other tenants, and did in fact harass, disturb and interfere materially and abnormally with Merchants' right of possession, beneficial use, enjoyment and occupancy of its space in the building.

7. Clark-Congress Corporation, its employees and agents, were in control of said building, as lessor to both Merchants and to the United States of America during the period from August 1, 1951, to December 9, and thereafter until December 31, 1951; Clark-Congress Corporation was particularly in control of the elevators, corridors, courtway and other public space in said building, and did nothing to pro-

hibit the improper use of these areas by the United States of America; Mr. Gardner, an employee or agent of Clark-Congress Corporation, was in the building daily during the demolition and alteration work in October, November and December of 1951 and followed the daily course and progress of this work in the building and knew or must be deemed to have known, what was occurring by reason of the Government's actions. Complaints were frequently made by Merchants Matrix Cut Syndicate, Inc., to the Office of the Building during the time Clark-Congress was lessor and had the duties of management of said building during the period from October 10, 1951, to December 9, 1951, about the serious disturbances to Merchants' possession and beneficial use and enjoyment of the space occupied by Merchants in the Rand McNally Building.

8. Clark-Congress Corporation through Mr. Gardner and Mr. Roesing cancelled out effective leases to a great number of tenants in said building, and the space in the building covered by said cancelled leases was then immediately turned over to and accepted by the United States of America (G.S.A.), and this was done by Clark-Congress Corporation even though under the lease of June 22, 1951, with the United States of America, Clark-Congress Corporation was not obligated to turn space over to the Government until the vacant space amounted to a contiguous block of 12,000 square feet or more, whereas in fact all said space that was turned over was in smaller amounts than 12,000 square feet, and was not turned over as contiguous space, and thereby caused a further congestion of the elevators and courtway through the moving out of dispossessed tenants.

9. As a result of the negligence and unlawful acts in demolition, alteration and reconstruction in the building, the excessive dust created by the plaster from the broken walls of the build-

ing, and arising from the large pile of rubble in the courtway of the building, delayed Merchants' production, caused extra overtime, caused spoilage and damage to its mats, plates and other products and otherwise seriously interfered with Merchants' possession and beneficial use and enjoyment of the space occupied by it in the Rand McNally Building, and together with the interruption of services such as electrical current and live steam for considerable periods of time, causing delay and extra expense in production, and together with the obstruction of the corridors, delay and interference with the elevator services in the building, clogging of the courtway area and blocking off of the loading platforms of the building, seriously interfered with, interrupted and disturbed Merchants' business operations, and rendered the space occupied by Merchants unfit for occupancy for the purposes for which Merchants had leased and occupied it.

10. These serious interferences with, interruptions of, and disturbance to Merchants Matrix Cut Syndicate's business operations and Merchants' beneficial use, enjoyment and occupancy of the space occupied by Merchants in the Rand McNally Building forced Mr. Allen, President of Merchants, to reach the conclusion on or about November 15, 1951, that he could no longer continue to operate his business in the building because of the disturbance and interference caused by the Government's negligence and unlawful acts in connection with the demolition and alteration work in the building, which caused Merchants to abandon the premises.

11. Thereupon Mr. J. B. Allen and other officers and employees of Merchants looked for and were unable to find any rental space in the City of Chicago to which to move, as there was no rental space available in the City of Chicago to which Merchants could remove its business

operations, as there was no such space that could furnish live steam, 24 hour elevator service, direct electrical current and adequate loading facilities and freight elevators, and requisite floor load capacity, all essential to Merchants' continued business operations. Thereupon, Merchants was forced to find and did find a partially completed factory building on or about November 20, 1951, and to which building Merchants moved as soon as it had been completed according to Merchants' plans and specifications.

12. The nature of the business carried on by Merchants in its premises in the Rand McNally Building, and the facilities required to operate its business were such that Merchants was unable to find rental quarters providing adequate facilities to which to move, and Merchants moved out of said building as soon as the partially completed factory building was completed, and said moving was within a reasonable time of the disturbance of its possession, use, occupancy and enjoyment of the premises.

13. The disturbance to plaintiff's business caused by the continuance by defendant of its negligent and unlawful acts in connection with the demolition and alteration work in the building continued thereafter during the month of December, 1951, and the months that followed, during which time it was impossible for Merchants to remove its machinery and equipment from the building as it had no place to move to until completion of its new factory building on April 23rd, 1952.

14. The negligent and unlawful acts of the United States of America in interference with and disturbance to the rights of possession, use, enjoyment and occupancy, which started on or about October 3, 1951, continued thereafter throughout the entire remaining period of Merchants Matrix Cut Syndicate, Inc.'s occupancy in the Rand McNally Building, and these negli-

gent and unlawful acts of the United States of America caused Merchants Matrix Cut Syndicate, Inc., to suffer a loss of profits in the sum of $36,747.78.

15. As a result of the foregoing, Merchants Matrix Cut Syndicate, Inc., has suffered actual damages in the amount of $104,128.18 as follows:

Fair market value of Merchants' use and occupancy of space in the Rand McNally Building as measured by what next immediate occupier, United States of America, paid for that space under a voluntary lease, namely $3.66 per square foot, less rent reserved in Merchants' lease of $1.54 per square foot; differential $2.12 per square foot, 8,600 square feet for 1 year and 9 months from date of eviction to end of term	$31,906.00
Loss of Profits	36,747.78
Cost of moving machinery and equipment, value of machines lost and destroyed, and cost of moving machinery and equipment, office furniture, etc., including cost of breaking wall	9,877.88
Cost of electrical work in moving and relocation	14,649.62
Loss of piping and cost of pipe fitting work in moving and relocation	5,094.94
Cost re electric typewriters	302.27
Cost of parts in conversion of Lake Erie Presses	3,443.00
Value (depreciated) of air conditioning equipment destroyed	2,106.69
Total Damages	$104,128.18"

We think the government's argument based upon the statute of limitations is illusory and that under the theory of *Rayonier* v. *United States*, 352 U.S. 315 (1957), the decision below was correct, 28 U.S.C. §§ 2671–2680, except for the computation of damages.

Moving expenses which could not be recovered in the condemnation case cannot now be collected, under the Tort Claims Act, from the same sovereign which acquired the property, and interests, in question, by the exercise of its eminent domain power.

Finding of fact numbered 15, entered below, is a list of eight items underlying the total damages of $104,128.18. We cannot, in all fairness to the litigants, undertake a detailed analysis of those eight items for the purpose of ascertaining whether any moving expenses are, in fact, embedded in any one or

all of the listed figures, despite the descriptions accompanying each one of the items. The trial judge, assisted by counsel for both sides, can, as a practical matter, perform this task of determining just what items of moving expenses are lurking in the itemized figures.

For the foregoing reasons the judgment appealed, while correct on the general theory of tort liability, is reversed and remanded to the district court with directions to adjust the damages awarded plaintiff by eliminating any and all elements of moving expenses and then enter judgment, as thus reduced, for plaintiff.

Reversed and remanded with directions.

In the United States Court of Appeals for the Seventh Circuit

Chicago 10, Illinois

No. 12197

MERCHANTS MATRIX CUT SYNDICATE, INC., PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

———, 19—

Before PHILIP J. FINNEGAN, ELMER J. SCHNACKENBERG, W. LYNN PARKINSON, Circuit Judges

This cause came on to be heard on the transcript of the record from the United States District Court

for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, and that this cause be, and it is hereby, remanded to the said District Court with directions to adjust the damages awarded plaintiff by eliminating any and all elements of moving expenses and then enter judgment, as thus reduced, for plaintiff, pursuant to the opinion of this court filed this day.

In the United States Court of Appeals for the Seventh Circuit

Chicago 10, Illinois

No. 12197

MERCHANTS MATRIX CUT SYNDICATE, INC., PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Tuesday, November 4, 1959

Before PHILLIP J. FINNEGAN, ELMER J. SCHNACKENBERG, W. LYNN PARKINSON, Circuit Judges

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

In the United States Court of Appeals for the Seventh Circuit

Chicago 10, Illinois

No. 12197

MERCHANTS MATRIX CUT SYNDICATE, INC., PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Tuesday, November 4, 1959

Before F. RYAN DUFFY, Chief Judge; PHILIP J. FINNEGAN, ELMER J. SCHNACKENBERG, JOHN S. HASTINGS, W. LYNN PARKINSON, WIN G. KNOCH, Circuit Judges

It is ordered by the Court that the petition for a rehearing en banc be, and the same is hereby, DENIED.

U. S. GOVERNMENT PRINTING OFFICE: 1959